STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia
Plaintiff Below, Respondent

vs) No. 11-0231 (Doddridge County 09-F-4)

Jessica Dawn Pratt
Defendant Below, Petitioner

FILED
June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Jessica Dawn Pratt appeals her convictions of first degree arson and misdemeanor cruelty to animals following a bench trial and her sentence of concurrent terms of two to twenty years in prison and six months in jail. Petitioner's sentences were suspended and she was placed on probation for five years. The State of West Virginia has filed its response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on March 24, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

During the relevant time period, petitioner and her girlfriend, Michelle Wetzstein, lived in a trailer along with multiple dogs and cats. On December 16, 2008, petitioner and Wetzstein got into an argument late in the evening. Petitioner testified at trial that they had both been drinking. According to Wetzstein's trial testimony, petitioner told Wetzstein to get out. Wetzstein testified that she "went to grab [her] clothes" and "that is when [petitioner] came in and said you are not taking any of this. . . ." Wetzstein further testified that petitioner made the statement: "I will burn the son-of-a-bitch down. I will set the whole . . . place on fire." According to Wetzstein, petitioner then pulled out a lighter, took hold of a shirt belonging to Wetzstein that was still hanging in the closet and set it on fire using a lighter. The whole closet caught fire as a result.

Petitioner's testimony at trial gave a somewhat different version of events. She testified that during the argument with Wetzstein, she "went in the bedroom, lifted up a shirt laying on the floor and lit it, and was still arguing with [Wetzstein] in the process." She testified that the shirt she set on fire was "right in front of the closet where I laid it down." Petitioner further testified that upon realizing what she had done, she said to Wetzstein, "can you help me put this out?" Petitioner testified that when she "stomped on it, it went up the closet." On cross-examination, petitioner admitted that she intentionally burned the shirt.

According to the testimony of both women, petitioner sought Wetzstein's help in putting out the fire, but Wetzstein left the trailer to call 911 from another residence. Petitioner testified that she attempted to put out the fire with water and with her hands and feet. When she was unable to do so, she testified that she began to try to get the animals out of the burning trailer. The trailer and its contents were a total loss. Four animals died in the fire.

Petitioner was indicted for first degree arson and misdemeanor cruelty to animals. She waived her right to a jury trial. Following a bench trial, the circuit court convicted her of first degree arson and misdemeanor cruelty to animals. Petitioner moved for a new trial or vacation of the court's judgment of guilty as to the first degree arson count. The circuit court denied the motions and indicated that although it was a bench trial, it was well aware of and had considered the possible lesser included offenses, but believed that the facts justified the first degree arson conviction. The circuit court specifically acknowledged its reliance upon Wetzstein's testimony that petitioner stated her intention to burn the residence, as well as the shirt.

First Degree Arson

Petitioner argues that the circuit court incorrectly concluded that she had the requisite intent to commit first degree arson, that the circuit court constructively adopted a "transferred intent" theory unsupported by law,[1] that there was insufficient evidence to convict her of first degree arson, and that the circuit court erred in denying her motion for a new trial or vacation of the judgment of the court. "'In reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a *de novo* review. Syllabus Point 1, *Public Citizen, Inc. v. First Nat. Bank in Fairmont*, 198 W.Va. 329, 480 S.E. 2d 538

[1] The circuit court specifically addressed this assertion, denied reliance upon such transferred intent, and found that the necessary intent was present. Thus, this Court declines to further address petitioner's arguments regarding transferred intent.

(1996).'" Syl. Pt. 1, *State v. Mechling*, 219 W.Va. 366, 633 S.E.2d 311 (2006).

West Virginia Code § 61-3-1 (a) provides in part:

> Any person who willfully and maliciously sets fire to or burns, or who causes to be burned, or who aids, counsels, procures, persuades, incites, entices or solicits any person to burn, any dwelling, whether occupied, unoccupied or vacant, or any outbuilding, whether the property of himself or herself or of another, shall be guilty of arson in the first degree and, upon conviction thereof, be sentenced to the penitentiary for a definite term of imprisonment which is not less than two nor more than twenty years.

Petitioner contends that the evidence only shows that she intended to burn Wetzstein's shirt and cites *State v. Jones*, 174 W.Va. 700, 329 S.E.2d 65 (1985), as supporting her argument that the evidence was insufficient to establish the necessary intent for first degree arson. In *Jones*, the defendant, an inmate in a county jail, admittedly started a fire in the jail which resulted in damage to the jail. He was indicted for first degree arson. The State argued that the defendant started the fire to protest living conditions at the jail and, therefore, intended to burn the jail within the meaning of West Virginia Code § 61-3-1. The defendant however, asserted that he never intended to burn the jail but merely meant to burn the clothing of another inmate. The circuit court instructed the jury that it could return a verdict of guilty of first degree arson, guilty of fourth degree arson (attempt), or not guilty. The jury in *Jones* found the defendant guilty of first degree arson. On appeal, the defendant argued that the circuit court erred in not instructing the jury upon third degree arson. This Court reversed and remanded for a new trial allowing a jury instruction for third degree arson in addition to the instruction for first degree arson. The Court's focus in *Jones* was on the issue of whether third degree arson was a lesser included offense of first degree arson and on the issue of the propriety of the giving of a jury instruction for third degree arson.

The facts of the present case differ significantly from *Jones* as petitioner waived her right to a jury trial and was tried before the circuit court in a bench trial. There was no issue regarding the necessity of jury instructions in the case sub judice. As the trier of fact, the circuit court in the present case expressly stated in denying petitioner's motion for a new trial that it was "well aware"of the various degrees of arson and concluded that petitioner had committed first degree arson under the facts adduced at the bench trial, with particular reliance upon Wetzstein's testimony. Accordingly, this Court concludes that petitioner's arguments predicated upon *Jones*, which focused on the jury instructions in an arson case, do not establish error by the circuit court herein.

Petitioner also argues insufficiency of the evidence for the first degree arson conviction. "'A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.' Syllabus point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E. 2d 163 (1995)." Syl. Pt. 7, *State v. White,* 227 W.Va. 231, 707 S.E. 2d 841 (2011)

The State argues that West Virginia Code § 61-3-1 provides that a person is guilty of first degree arson if she willfully and maliciously causes a dwelling to be burned. The State argues that the evidence clearly showed that petitioner willfully and maliciously caused a dwelling to be burned, thus satisfying the elements for first degree arson. The fire investigator testified that petitioner would have had to deliberately hold the lighter in the same place for at least ten seconds in order to ignite the clothing. The fire investigator further testified that the physical evidence present after the fire supported Wetzstein's testimony that the shirt in question was still hanging in the closet amid all Wetzstein's other clothing when petitioner held that lighter to it and ignited it as it hung touching the other clothing, rather than petitioner's version that she picked up a shirt from the floor, lit the shirt, and then realizing belatedly what she had done, dropped the burning shirt into a pile of other clothing, ultimately igniting the closet and burning down the trailer. The fire investigator testified that the evidence he saw indicated a closet burn rather than a pile of clothes burning down at a lower level. During her rebuttal testimony, Wetzstein indicated that there were only shoes on the floor of the closet and that there was nothing piled up on the floor as petitioner asserted. Wetzstein further testified that petitioner did not pick up a shirt off the floor to ignite, instead she partly pulled out a shirt hanging in the closet and lit it on fire, which then ignited the whole closet. This Court notes the testimony of Wetzstein that petitioner verbalized her intent to "burn the son-of-a-bitch down. I will set the whole . . . place on fire." This Court concludes that the record establishes that there was sufficient evidence to support the conviction for first degree arson and that the circuit court did not err in denying petitioner's motion for new trial or vacation of the judgment of the court.

Cruelty to Animals

Petitioner argues that the circuit court erred when it found that her conduct met the statutory requirements of misdemeanor cruelty to animals [West Virginia Code § 61-8-19(a)

(1) (A)] and that there was insufficient evidence at trial to support a conviction for misdemeanor cruelty to animals. The relevant statute provides that it is unlawful for any person to intentionally, knowingly or recklessly mistreat an animal in a cruel manner. As the circuit court concluded, petitioner's conduct meets the statutory requirements for misdemeanor cruelty to animals because she deliberately set fire to clothing within the trailer containing her animals, and that caused four of the animals die by fire. As the circuit court held, "under any definition [such], whether to animal or a human, living and conscious, would be a cruel manner of death." This Court concludes, after review of the arguments of counsel and the record, that there was sufficient evidence to support petitioner's conviction for misdemeanor cruelty to animals and that there was no error in her conviction.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 24, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum